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Supreme Court of the United States

OCTOBER TERM, 1964

No. 447

NICOLA MASSA,

Petitioner,

—against—

Ca. VENEZUELAN NAVIGACION,

Respondent.

BRIEF OPPOSING CERTIORARI

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Statement

Petitioner, a longshoreman employed by the Respondent, John W. McGrath Corporation, instituted this action to recover damages for injuries which he claims he sustained as a result of being struck by cargo which fell from a pallet during the loading of the S.S. "Ciudad de Cumana", a vessel owned by the Respondent, Ca. Venezuelan Navigacion.

Counsel for the Petitioner advised the Trial Court that the action was to be tried on the *sole* theory that the accident which Petitioner met with, was due to the use of a defective pallet which had been furnished by the Respondent, John W. McGrath Corporation, to load the vessel and accordingly the vessel was thereby rendered unseaworthy.

It was stipulated by counsel for all parties that the pallet which was being used at the time Petitioner met

with his accident had been loaded and brought to the vessel's side by longshoremen employed and controlled by the Respondent, John W. McGrath Corporation, and that the pallet together with the bridle and gear used in connection therewith were owned by the Respondent, John W. McGrath Corporation. Counsel for the Respondent, John W. McGrath Corporation, further stipulated that it was his client's duty to maintain the pallets in good condition.

The Trial Judge found as a fact that the pallet and its appurtenances were free from all defects; were reasonably fit for their intended use and that Petitioner was injured solely by his own negligence and that of a fellow longshoreman who had improperly inserted the pallet bars and as a result thereof the loaded pallet was lifted unevenly thus causing cargo to spill and thereby strike the Petitioner [Pet's. App. C, p. 13a].

The Trial Court further found as a fact that the Respondent, Ca. Venezuelan Navigacion, had no knowledge of the manner in which Petitioner or his co-workers had improperly inserted the tongs of the pallet bars prior to the time the pallet was lifted and accordingly the Respondent, Ca. Venezuelan Navigacion, was not negligent nor was its vessel unseaworthy [Pet's. App. C, p. 13a].

The Circuit Court of Appeals sustained the District Court's holding that the credible testimony necessitated a finding that the pallets were not defective but on the contrary that the Petitioner and his co-workers caused the accident by placing the tongs of the pallet bars in the wrong holes and in addition thereto it held

that the Trial Court was justified in concluding that the pallets were reasonably fit for their intended use [Pet's. App. A. p. 4a].

ARGUMENT

POINT I

The authorities relied upon by the petitioner do not support his contention that this Court should grant his petition for a writ of certiorari.

In *Point I* of Petitioner's brief he urges that the decision of the Court below is inconsistent with this Court's holding in the case of *Gutierrez* v. *Waterman*, 373 U. S. 206, which stated that a shipowner would be held liable, irrespective of whether it had control of the area where the longshoreman was injured, when it knew or should have known that an accident might occur by reason of the existence of a dangerous condition which it failed to rectify.

The facts in *Gutierrez*, supra, are clearly distinguishable from the facts in this action in that there was no evidence that the Respondent, Ca. Venezuelan Navigacion, had any knowledge of an alleged defective condition which it failed to rectify, but, on the contrary, it was specifically found that the pallet was not defective. Accordingly, *Gutierrez* supra, has no application.

The Petitioner further argues under *Point II* of his brief that an inter-Circuit conflict exists between the Circuit Court's holding in this case and the Third

Circuit Court's holding in *Ferrante* v. *Swedish American Lines*, 331 F. 2d 571 and *Thompson* v. *Calmar S. S. Corp.*, 331 F. 2d 657. Petitions for a writ of certiorari are now pending before this Court in both *Ferrante* and *Thompson*, supra.

In *Thompson*, supra, the Circuit Court of Appeals for the Third Circuit held that the shipowner was liable for injuries sustained to the plaintiff-longshoreman when a dangerous method was employed in moving a gondola car from which cargo was to be loaded into the vessel. Evidence was introduced to prove that the same operation, to wit, the movement of the gondola car, could have been performed by four different methods or devices other than that used by the longshoremen, with safety. *Thompson*, supra, therefore is clearly distinguishable on the facts from the instant case in which no proof was offered that the ship could have been loaded by a method other than that which the Petitioner and his co-workers had employed throughout the entire loading operation of the vessel.

The *Ferrante* case, supra, likewise on its very facts must be distinguished from this action in that the Circuit Court for the Third Circuit found that Ferrante was injured because of an improper method by which the vessel was loaded. Again the distinction is clear between *Ferrante*, supra, and the instant case in that there was no criticism made of the method employed in the loading operation by the Petitioner and his co-workers. Therefore, the *Ferrante* decision, supra, must be strictly limited to its facts and it is clear that the holding in that case and in *Thompson*,

supra (the soundness of which is seriously doubted) must be narrowly construed.

The Court in *Thompson* and *Ferrante*, supra, based its findings solely on the fact that an improper method of loading or unloading cargo might give rise to unseaworthiness and such fact is not present in this action.

The holding of the Circuit Court of Appeals in this case is in accord with *Arena* v. *Luckenbach Steamship Company, Inc.*, 279 F. 2d 186 (1960) cert. denied 364 U.S. 895 (1960); *Puddu* v. *Royal Netherlands Steamship Co.*, 303 F. 2d 752 (1962) cert. denied 371 U.S. 870 (1962); *Spinelli* v. *Isthmian Steamship Co.*, 326 F. 2d 870 (1964) cert. denied 377 U.S. 935 (1964).

The *Ferrante* case, supra, could be further distinguished on another separate ground, namely, that the Court held that the shipowner's officers knew or should have known that the cargo was being discharged in an unsafe manner. A close examination of the record in this case discloses that the shipowner's officers had absolutely no knowledge of the manner in which the longshoremen undertook to perform their duties [Pet.'s App. C. p. 13a].

The Petitioner also urges, as a ground for a review of this case by this Court in *Point III* of his brief, that a conflict exists between the holding of the Court in this case and the holding of the Circuit Court for the Second Circuit in the case of *Grillea* v. *U. S.*, 232 F. 2d 919.

In *Grillea*, supra, the Circuit Court held that the shipowner was liable for the injuries sustained by the

plaintiff because it had permitted a wrong hatch cover to be placed over a pad-eye of the vessel one day prior to the day on which the plaintiff stepped on the hatch cover whereby he was caused to suffer injuries. No such facts exist here. On the contrary, Petitioner's injuries were caused by a wrongful act of the Petitioner or his co-workers in creating a condition which was transitory as distinguished from the condition in *Grillea*, supra, which had existed for a period of at least one day prior to the accident.

Therefore, it cannot be urged that the decision in *Grillea*, supra, is in conflict with the Court's decision in this case as the facts are different.

POINT II

The stipulation entered into by counsel during the trial of the second action was solely limited to the testimony given by the petitioner in the prior trial of this action.

The Petitioner finally argues that a review of this case is warranted because the Court below committed an error in upholding the Trial Court which failed to give effect to a stipulation entered into among counsel at the first trial of this action.

Petitioner contends that on the first trial of the action a stipulation was entered into whereby the parties agreed that there were three empty pallets stacked together thus forming a platform and therefore the Trial Court was in error in disregarding

this stipulation and finding on the second trial that there were only two empty pallets in the supporting platform. The stipulation entered into between counsel for all parties on the first trial which referred to the number of empty pallets did not survive the second trial because it was specifically stipulated among all counsel at the second trial that Petitioner would be excused from testifying and that his prior testimony would be accepted into evidence. The stipulation was solely limited to Petitioner's testimony on the first trial and did not embrace or encompass any stipulation entered into by the attorneys on the previous trial.

The Court below correctly held that the stipulation on the second trial was limited to the previous testimony of Petitioner and no stipulation was entered into at the second trial that there were three empty pallets in the supporting platform [Pet.'s App. A. p. 3a].

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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